

OPINION
72-147

April 17, 1972 (OPINION)

The Honorable Ben Meier

Secretary of State

RE: Elections - Residency Requirements - Constitutionality

This is in response to your request for an opinion as to the status of the North Dakota residency requirements as defined by Section 16-01-03 of the North Dakota Century Code in light of the recent Supreme Court decision negating such statutes.

The residency requirements in North Dakota are found in Article 40 of the North Dakota Constitution and in Section 16-01-03. Article 40 provides as follows:

"North Dakota: Every qualified elector, who shall have resided in the state one year, in the county ninety days and in the precinct thirty days next preceding any election, shall be entitled to vote at such election. Provided that where a qualified elector moves from one precinct to another within the state he shall be entitled to vote in the precinct from which he moves until he establishes his residence in the precinct to which he moves."

The last sentence deserves comment, which will be made later. Section 16-01-03 provides as follows:

"QUALIFICATIONS OF ELECTORS. Any person of the age of twenty-one years or upwards, who has resided in this state one year, in the county ninety days, and in the precinct thirty days next preceding any election, except as otherwise provided in regard to residency in chapter 16-16, shall be a qualified elector at such election if he is a citizen of the United States. Any person between the ages of eighteen and twenty-one, who is a citizen of the United States and is otherwise qualified as an elector, shall be entitled to vote for elected federal officers at any election in which a federal official is to be elected."

We observe that this section was amended to conform with the federal voting act as to presidential and congressional candidates.

The United States Supreme Court in *Dunn, Governor of Tennessee, et al., v. Blumstein*, on March 21, 1972, held that durational residence requirements are violative of the Equal Protection Clause of the Fourteenth Amendment, if they are not necessary to further a compelling state interest.

In this case, the court had under consideration the Tennessee statutes which required residence in the state for one year and in the county for three months as a prerequisite to exercising the elective franchise or right in the State of Tennessee. The state of

Tennessee also had a registration act which closed registration thirty days prior to the election. Under the registration act a person had to be registered at least thirty days before the election in order to vote at an election.

The Court in effect held that any durational residence requirements must have a compelling state interest before same may be upheld. In the Blumstein case the State of Tennessee contended that "insured purity of ballot box and knowledgeable voter" aims and objectives constituted compelling state interests, but this contention was rejected by the court.

The court also held that absent a compelling state interest, the state of Tennessee could not burden the right to travel by formalizing those bona fide residents who recently traveled from one jurisdiction to another. The constitutional right to travel was upheld in a number of cases such as *Wyman v. Bowens*, 397 U.S. 49, *Shapiro v. Thompson*, 394 U.S. 618, as well as *Oregon v. Mitchell*, 400 U.S. 112, 237 and 284.

In substance, the United States Supreme Court declared the one year and the ninety-day durational residency requirement unconstitutional. The court further advised that a thirty-day period appears to be ample to complete whatever administrative tasks are needed to prevent fraud and ensure the purity of the ballot box.

The decision does not disclose whether or not the State of Tennessee had a retention of voting rights provisions as we have in North Dakota which is found in the last sentence of Article 40 and also in Section 16-01-05 providing in substance that where an elector moves from one precinct to another within the state he shall be entitled to vote in the precinct from which he moved until he establishes his residence in the precinct to which he moves. Neither are we aware that the State of Tennessee has a similar provision. The decision does not disclose whether the State of Tennessee permitted the use of absentee ballots in elections. Conceivably, if every state in the union had a retention of voting rights provision such as found in North Dakota, coupled with the use of the absentee ballot, the Supreme Court decision may have been different, but even applying the rationale that might have been applied if all of the states had such provision, it would not be of compelling significance to the present situation because North Dakota would still require a person to be a resident in the state for one year, ninety days in the county and thirty days in the precinct before being eligible to vote in the state. Thus, any speculation as to what the decision may have been, would be of no value.

Unlike Tennessee, North Dakota does not have a registration act, but in reviewing the discussion of the act we do not believe that the decision hinged on the fact that Tennessee had a registration act. What is, however, significant is that the State of Tennessee uses an affidavit in connection with and at the time of registration. The court took cognizance of this provision and concluded that such affidavit to a great degree prevented fraud and preserved the purity of the ballot box. In North Dakota the affidavit is used only at the time of voting which leaves little or no opportunity to check the accuracy of the affidavit.

We are convinced that the reasons expressed by the court in declaring unconstitutional the statutes of the State of Tennessee would have application to the constitutional and statutory durational requirements in this state and that if the constitutional and statutory provisions of this state were challenged, the result would be the same as in the Tennessee case. Our conclusion is reaffirmed by the recent Supreme Court decision involving the residency requirements in the State of Minnesota.

We are mindful that the Supreme Court indicated that thirty days is sufficient to perform the necessary functions needed to prevent fraud, but we do not have any specific direction as to what amount of time will be permitted. Justice Blackmun in the special concurring opinion said it (residency requirements) is, of course, a matter of line drawing, as the Court concedes in its opinion on page 18. He continues by saying "but if thirty days passed constitutional muster, what of thirty-five or forty-five or seventy-five days". Conceivably the court would approved a period of time less than ninety days, but more than thirty. Be that as it may, we do not have authority to rewrite the residency requirements set out by the constitution and statutes. We are limited to applying the decision of the United States Supreme Court to such constitutional and statutory provisions. We are also obligated to determine which portion of the statute, if any, can stand separately if another portion or portions of the same statutory or constitutional provisions are found invalid or unconstitutional.

We have three distinct requirements on residency - one year for the state, ninety days for the county, and thirty days for the precinct. These are in a sense severable. By applying the court decision, the one year requirement and the ninety-day requirement must fall. This leaves the thirty-day requirement. We also recognize that a requirement of thirty days in the precinct necessarily implies at least thirty days in the state. Thus, by employing the severability theory, we have remaining only the thirty-day requirement in the precinct.

From the discussion in the Blumstein case, it does appear that purity of the ballot would almost suggest a form of registration which is a subject matter the North Dakota Legislature should seriously entertain.

Based on the foregoing, it is our opinion that North Dakota may employ the thirty-day residency requirement until such time as the Legislature may provide a different time limit within the limitations contained in the recent opinion of the United States Supreme Court.

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